COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 017157-09**

Tarsha-Marie Schwarzenberg	Employee
Fresenius Medical Co.	Employer
American Casualty Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Horan and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES
Mark A. Machera, Esq., for the employee
Thomas P. O'Reilly, Esq., for the insurer at hearing
Paul M. Moretti, Esq., for the insurer on appeal

FABRICANT, J. The insurer appeals from a decision in which the administrative judge awarded the employee § 35 partial incapacity benefits based on a vocational assessment that she could return to a thirty hour week performing light duty nursing work. The insurer argues that the judge's finding of a part-time restriction for this employee is unsupported. We agree.

On July 11, 2009, the employee, a registered nurse, was injured at work when a combative patient kicked her in the head, neck and right shoulder. She left work, returning on September 29, 2009 with a light duty restriction. The employer laid her off in May 2010, following an incident in which she incorrectly recorded a patient's medication. The employee filed for and received unemployment compensation. All the while, she continued to experience pain in the back of her neck, shoulder, forearm and right hand, with right hand numbness. On October 1, 2010, the employee voluntarily relinquished her unemployment compensation claim to undergo surgery to repair a tear in her right elbow. The surgery eliminated the numbness in her right hand. She was released to return to work full time with a twenty pound lifting restriction. (Dec. 824-826.)

Prior to her work injury, the employee had also worked concurrently for a company owned by members of her family, doing assembly, shipping and receiving, record keeping and human resource work. She stopped working at this job shortly after her injury, as she could not perform the heavier duties involved. (Dec. 826.)

In November 2010, the employee started per diem work with a home medical care business. Her hours fluctuated according to the available work that was within her twenty pound lifting restriction. She stopped working there in April 2011 to give birth, and has been searching unsuccessfully for full time nursing work with lifting restrictions since the summer of 2011. (Dec. 827.)

The employee filed this claim on October 21, 2010, and the § 10A conference order of November 4, 2010, awarded ongoing § 34 benefits, commencing on October 1, 2010. The insurer appealed the conference order and on February 11, 2011, the employee submitted to an impartial medical examination pursuant to § 11A. The impartial doctor diagnosed the employee as having suffered an acute cervical strain and contusions of the face and neck; an acute scapulothoracic strain with right shoulder contusions; a strain of the common extensor group of the right elbow, leading to post traumatic lateral epicondylitis; and a contusion of the right elbow resulting in post traumatic ulnar compression neuropathy in the cubital tunnel. All diagnoses were causally related to the employee's work injury. The impartial doctor released the employee to full time employment with restrictions which included avoidance of heavy grasping activities and lifting more than twenty pounds. (Dec. 827-828.)

Vocational experts testifying for each party agreed that the employee could return to full time light duty nursing work. However, no job offer has been forthcoming from the employer. (Dec. 827.)

The judge found the employee was partially disabled, and that she could return to full time, light duty nursing or other work as of November 5, 2010. Based on the expert vocational testimony, the judge found that the employee was

capable of earning $29 per hour. He then found that she could work only a thirty hour week. Alternatively, the judge found that the employee could return to a full time job outside of nursing, which would pay the same $870 weekly earning capacity as she maintained for her nursing occupation. (Dec. 829.)

The insurer argues that the judge offered no explanation for finding that the employee was capable of working only a thirty hour week, even though all of the expert medical and vocational opinion evidence established that the employee could work full time. Taking "full time" to mean a common, forty hour work week, we acknowledge the discrepancy, and cannot discern a "factual basis" in the record for the judge's thirty hour limitation. See Eady's Case, 72 Mass. App. Ct. 724, 726 (2008). The judge appears to offer justification for this finding by crediting the employee's testimony that she has not been able to find light duty nursing work.[1] (Dec. 829.) However, that testimony offers no evidentiary support for such a limitation.

The insurer also argues that the judge failed to consider the employee's pre-injury concurrent employment in determining her current earning capacity. The employee stopped working her second job after her injury, because she could no longer perform the heavier duties required. (Dec. 826.) Thus, the only issue remaining as to concurrent employment is whether the employee has the present capacity to work a schedule in excess of a full time, forty hour week. The record is devoid of any evidence that the employee has such a work capacity. As noted above, all the evidence supports a full time work capacity. No inquiry was made at the impartial physician's deposition as to whether the employee could work more than a forty hour week. We therefore see no error in the omission of

---

[1] The judge found:

> I also find that she could work only 30 hours a week. She has searched for nursing work since several weeks [sic] after the birth of her child and has not found work. This suggests that light duty nursing work is difficult to find.

(Dec. 829.)

prospective wages from concurrent employment from the employee's earning capacity.

Since the record evidence supports only one result, namely, that the employee can work a full time, light duty job, recommittal is unnecessary. See, e.g., Liberman v. McLean Hosp., 17 Mass. Workers' Comp. Rep. 1, 5 (2003), citing Roney's Case, 316 Mass. 732, 739 (1944). Accordingly, we reverse the decision in part, and order that the employee's weekly earning capacity be assigned at $1,160, which amount represents forty hours at the unchallenged rate of $29 per hour.

So ordered.

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Mark D. Horan
Administrative Law Judge

_____
Catherine W. Koziol
Administrative Law Judge

Filed: **June 27, 2012**